In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 396

ROBERT F. BUGGS, *Petitioner,*

vs.

FORD MOTOR COMPANY, a Foreign Corporation,

*Respondent.*

## BRIEF OF RESPONDENT

Opposing Granting of Writ of Certiorari.

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## List of Authorities Cited.

List of Authorities Cited—*Continued.*



**Statutes.**

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### I.

### Opinion of the Court Below.

The opinion in the Circuit Court of Appeals (R. 120-125) is reported in *113 Fed. Rep. (2d) 618.*

### II.

### Jurisdiction.

Respondent opposes the granting of the writ of certiorari on the ground that there are no special and important reasons set forth therefor, under Supreme Court Rule 38-5.

## III.

### Statement of Case.

The following additional statement is deemed necessary for the correction of inaccuracies and omissions in petitioner's statement.

The gist of petitioner's (plaintiff below) complaint is an alleged violation of a *written* "franchise" dated May 26, 1932 (R. 12-16). It is undisputed and the district court found (R. 99-104) that the only written agreement between the parties dated May 26, 1932 is the sales agreement in question (Exhibit A attached to defendant's pleadings R. 41-46). Petitioner did not aver any other "franchise" but did aver that cancellation of his "franchise" was in violation of paragraphs 15, 16 and 17 of sub-section (3) (a) of Section 218.01 of the Wisconsin Statutes of 1937 quoted in full on pages 19-35 of petitioner's brief and asked damages for alleged violation of the claimed "franchise" and the statute (R. 12-16). Accordingly, petitioner is necessarily relying on the very written document he claims is void.

Respondent (defendant below) avers (R. 17-39) that this sales agreement of May 26, 1932 (R. 41-46) was valid and exclusively controls the rights and obligations of the parties, was terminable at the will of either party without cause, and was in fact terminated pursuant to notice (Exhibit B, R. 47) and that the statute has no application. Respondent claims that termination of said agreement pursuant to its terms did not create any cause of action for damages in the petitioner either under the agreement or the statute and further that the statute is unconstitutional and in violaion of the Wisconsin and United States Constitutions (R. 22-23-25). The agreement of May 26, 1932, authorized petitioner to maintain "Ford" signs and required him to remove those signs on termination of the contract. Petitioner failed to remove the signs on termina-

tion of the sales agreement (R. 63-81, 87-91) and respondent in its pleadings included an equitable defense and counterclaim wherein it sought a mandatory injunction to compel petitioner to remove said signs (R. 25-39).

Respondent filed a motion for summary judgment (R. 55-91), in opposition to which petitioner filed affidavits (R. 93-97). On the hearing on this motion for summary judgment, petitioner consented to the injunction (R. 98) and the court made findings of undisputed facts and conclusions of law (R. 99-104) upon which the judgment was based dismissing the complaint of the petitioner on the merits and issued an injunction as prayed for by respondent (R. 105-107).

By the terms of the sales agreement of May 26, 1932 (R. 41-46) petitioner was required to maintain a place of business suitably located and equipped as sales room and service station and acceptable to Company; to conspicuously display effective signs; to carry an adequate stock of genuine Ford parts; to install and maintain tools and machinery in said service station as recommended by Company; to employ competent salesmen; and to make repairs in a workmanlike manner on products of the Company whether sold by the dealer or not. In return, Company agreed to sell to petitioner Company products and gave petitioner the right during the period said contract was in operation to hold himself out as an authorized Ford dealer and to display Ford signs (see paragraph 7 (a) and (g) of sales agreement, R. 42, 44).

The District Court found that the "franchise" upon which petitioner relied was said sales agreement of May 26, 1932 (R. 41-46), that the statute was enacted long after the sales agreement was made and therefore found that the statute had no application to this case, and dismissed the petitioner's action without passing on the constitutional questions raised by respondent (R. 98-107). The Circuit

Court of Appeals affirmed the judgment of the District Court and likewise made no decision respecting the constitutionality of the Wisconsin Statute (R. 120-126, 113 Fed. (2d) 618-621).

Petitioner's brief contains inaccurate statements of fact and ambiguous language that may be misleading:

(a) It is not denied that the effective date of the provisions of the statute relied upon by petitioner was July 14, 1937 and that the date of cancellation of petitioner's sales agreement by respondent was September 27, 1937, but it is also undisputed that the date of the sales agreement, May 26, 1932, was long before the statute became effective. Both the District Court and the Circuit Court of Appeals held that the statute had no application to this agreement because it was enacted after the agreement was made. Therefore, the statements on page 6 of petitioner's brief that "The statute * * * was applicable to the parties at the time petitioner's cause of action arose, * * * (is) admitted on the record," and on page 7 of petitioner's brief that "This statute was applicable to both parties *at the time of the alleged wrongful act,*" are inaccurate.

(b) The opinion of the Circuit Court of Appeals says (R. 122, 113 Fed. (2d) 619):

"The legal questions are:

"1. Is the Wisconsin statute (Wis. Stats. 218.01 (3) (a) 17) valid? Is it retroactive?

"2. Is one aggrieved by the inexcusable cancellation of his dealer's contract entitled to maintain an action for damages because of this statute which provides for cancellation of the manufacturer's right to do business in the State of Wisconsin in case it inexcusably and unjustifiably cancels a dealer's agreement?

"3. Was the last written agreement between plaintiff and defendant invalid because unilateral?

"4. If invalid, were there valid contractual obligations binding on the parties on September 22, 1937, which made applicable the aforesaid Wisconsin statute?"

The Circuit Court of Appeals only decided that the sales agreement was a valid contract and that the statute was not retroactive and left the other questions undecided. Hence the allegation on pages 6 and 7 of petitioner's brief that the court below did not question a statutory duty by respondent is inaccurate.

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## IV.

## Argument.

**A — The decision of the Circuit Court of Appeals for the Seventh Circuit in this case is not in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit, in the case of Ford Motor Company vs. Kirkmyer Motor Company, 65 Fed. (2d) 1001.**

The decision of the Circuit Court of Appeals for the Seventh Circuit in this case holds, "We are convinced that the agreement before us is not unilateral and is valid (R. 123, 113 Fed. (2d) 619).

There is nothing in the record or in published opinions from which it can be determined that the contract in the case at bar is identical with the written contract mentioned in the *Kirkmyer* case. The quotations of some particular paragraphs of that contract while similar to corresponding paragraphs in respondent's sales agreement (R. 41-46) are somewhat at variance and do not purport to state the entire contract and hence indicate that the contracts are on different forms.

However, the *Kirkmyer* case is based upon an alleged "*verbal*" contract. In the *Kirkmyer* case, Kirkmyer was

a Ford dealer in Richmond who alleged that he was induced to his damage to move to "South Richmond" on a *"verbal"* promise by an agent of Ford Motor Company to award Kirkmyer a dealership in the "West End" in case Ford Motor Company appointed an additional dealer there. Kirkmyer was not granted the additional dealership created in the "West End." Kirkmyer operated in "South Richmond" under a sales agreement negotiated simultaneously with or subsequent to the alleged verbal agreement. The real decision in the *Kirkmyer* case was that the alleged verbal agreement was lacking in mutuality and entirely too indefinite to form the basis of a binding obligation. In that decision the court said, 65 Fed. (2d) 1003:

> "To say that the parties contemplated that plaintiff should be given a contract of the character that defendant was making with other dealers in 1930, such as it entered into with plaintiff in South Richmond or with Womble Motor Company for the West End, does not help plaintiff's position; for this written contract does not obligate defendant to deliver a single car or truck and *may be terminated at any time at the will of either party.* It merely furnishes a basis upon which dealings are to be conducted; and *while it is a binding contract to the extent that it is performed in that it attaches to and becomes a part of transactions entered into so long as it remains uncancelled * * * and imposes certain obligations as to how dealings shall be conducted,* it imposes no obligation on defendant to sell or on the dealer to buy and furnishes no basis for recovery of damages if defendant refuses to sell" (italics ours).

The *Kirymyer* case refers to the sales agreement therein mentioned as a "franchise." It appears from the above quotation that the court did not say that the contract was void but said that it became a part of the transactions between the parties so long as it remained uncancelled. The statement in the *Kirkmyer* case is essentially not that the written sales agreement was void but that if a verbal con-

tract had been made to enter into such a sales agreement, it was entirely too indefinite to form the basis of a binding obligation, as the sales agreement could, after execution, be terminated by either party at will.

Petitioner has an inconsistent position in this case. He claims to have held a written franchise (R. 13). He can show no other written document than the sales agreement of May 26, 1932. He claims that the decision in the *Kirkmyer* case is at divergence with the decision of the case at bar. The *Kirkmyer* case refers to a written sales agreement as a franchise. So petitioner is arguing on the authority of the *Kirkmyer* case that his franchise is void (Petitioner's Brief page 8) and a nullity (Petitioner's Brief page 7) which could not possibly help him to recover damages for cancelling it.

The *Kirkmyer* case states that the relationships of the parties under the written sales agreements are governed by the terms of that sales agreement and that those relationships may be terminated at will by cancelling the contract in accordance with its terms without liability. Therefore, so far as the issue involved in the case at bar is concerned, the decision of the Circuit Court of Appeals for the Seventh Circuit is not in divergence with the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Kirkmyer* case.

The court below did not admit that there was a divergence of opinion between the *Kirkmyer* case and this case as claimed by petitioner on page 7 of his brief. The court says (R. 122, 113 Fed. (2d) 619):

> "The case which most strongly supports plaintiff's position is Ford Motor Company vs. Kirkmyer, 65 Fed. (2nd) 1001, a decision by the Circuit Court of Appeals of the Fourth Circuit."

However, the court also says (R. 123):

> "Such disagreement as seemingly exists in the decisions may be partly attributed to the differences in the terms of the agreements under attack."

**B — The sales agreement of May 26, 1932 (R. 41-46) involved in this case is a perfectly valid contract between the parties containing a provision for its termination and was properly terminated in accordance with that termination clause and hence the decision of the Circuit Court of Appeals for the Seventh Circuit in this case is clearly correct.**

"The purchase of an automobile is not like the purchase of a sack of potatoes" (see *Ford Motor Company vs. Boone*, 244 Fed. 335, 338). Since in order to maintain its business and good will, a manufacturer must provide means for repair and servicing of its products, the only practicable method of fulfilling this necessity is to maintain a dealership organization, the duties of which are defined by contract between the manufacturer and such dealers. The contract in question (R. 41-46) provides for the sale of Ford products to petitioner for resale. As it is a continuing contract it does not recite the exact price of the goods to be sold, but instead provides for sale at list prices or at such discount from published prices as is from time to time fixed by the company, and as stated by the Circuit Court of Appeals, "These net list prices and published list prices were the same to all dealers," and the Circuit Court of Appeals held that it lawfully "provided a method whereby the price could be definitely ascertained at any time" (R. 125, 113 Fed. (2d) 620; and see cases cited in the Opinion).

This contract is a basic contract which sets up the conditions under which the parties will operate. In return for establishing one place of business equipped, manned and displaying effective signs in a manner acceptable to Com-

pany to sell and service Ford products, the dealer gets the privilege of holding himself out as a Ford dealer, of displaying the Ford signs and of trading on the Ford name so long as the contract remains in effect and no longer.

This is admittedly a right of some value to the dealer. If it were not so, there would be absolutely no point to the petitioner's claim for damages for terminating that right. Petitioner's entire claim goes to a claimed right to have the dealer relationship as provided by the sales agreement (R. 41-46). It therefore seems perfectly clear that in entering into the sales agreement Buggs not only agreed to maintain certain facilities and conduct his business in a certain way but also there moved from Ford Motor Company to him a consideration of value, to-wit, the right to display the Ford signs over his place of business and to hold himself out as an authorized Ford dealer. Such being the case, there was ample consideration on both sides of the contract and hence there was mutuality and the contract was perfectly valid. It seems rather stange that someone who claims that the right to be a Ford dealer is no consideration to him and therefore his contract is void, should be suing the other party to such a contract for $150,000.00 in damages for the termination of his right to be a Ford dealer.

See also argument under subdivision (D) following, and decision of Circuit Court of Appeals herein setting forth its reasons why the contract is valid (R. 123-125, 113 Fed. (2d) 619, 620).

In the case of *Ford Motor Company vs. Alexander Motor Company,* 223 Ky. 16, 2 S. W. (2d) 1031, the court said:

> "It is a well-settled rule of law that a right to cancel a contract, incorporated or reserved therein, is a part of the contract itself, and, upon the exercise of such contractual right, all obligations under the contract cease and determine, and no liability arises from the cancellation. Louisville Tobacco Warehouse Co. vs. Ziegler, 196 Ky. 414, 244 S. W. 899.

"Parties may lawfully enter into agreements like the one here involved, and the courts enforce them as written. If parties agree that the rights, duties, and obligations arising from a contractual relation shall endure only at the will or pleasure of either, the courts have no right to substitute a different duration for such rights. Executory contracts, terminable at will, insofar as they are unexecuted at the time of termination, afford no basis for a cause of action to either party. Rehmzeiher Co. vs. Walker Co., 156 Ky. 6, 160 S. W. 777, 49 L. R. A. (N. S.) 694; Paragon Oil Co. vs. Hughes, 193 Ky. 534, 236 S. W. 963; Daniel Boone Coal Co. vs. Miller, 186 Ky. 561, 217 S. W. 666; Soaper vs. King, 167 Ky. 126, 180 S. W. 46; Ross-Vaughn Tobacco Co. vs. Johnson, 182 Ky. 325, 206 S. W. 487; Goff vs. Saxon, 175 Ky. 330, 192 S. W. 24.

"*Such contracts are binding on both parties, until the right of cancellation is exercised by one or the other.* Guffey vs. Smith, 237 U. S. 101, 35 S. Ct. 526, 59 L. Ed. 856" (italics ours).

**C — If the contract lacks mutuality, petitioner likewise has no cause of action for damages.**

The court found that there was a valid contract, and as we have pointed out the same is a valid contract, and there are no decisions holding that this form of contract is invalid, yet if the Court deem it one without mutuality, as claimed by the petitioner, he likewise has no cause of action for damages, and the court's decision is still correct.

*E. I. DuPont de Nemours & Co. vs. Claiborne-Reno,* 64 Fed. (2d) 224;

*Huffman vs. Paige-Detroit Motor Car Co.,* 262 Fed. 116;

*Ford Motor Company vs. Kirkmyer Motor Company,* 65 Fed. (2d) 1001, 1006 (cited by petitioner);

*Motor Car Supply Co. vs. General Household Utilities Co.,* 80 Fed. (2d) 167 (cited by petitioner).

**D — The decision is not in conflict with local law or local decisions.**

Petitioner's claim that the decision is in conflict with local law seems to be based upon the provision of the sales agreement declaring it to be a Michigan contract governed by the laws of Michigan and a claim that the decision is in conflict with Michigan decisions, citing two Michigan cases (petitioner's brief, pp. 13 and 14). Petition also cites certain cases which petitioner claims show that the decision repudiates the established law of contracts (petitioner's brief, pp. 14 to 17).

The fact that the contract (R. 41-46) contemplates the establishment, equipment according to certain standards, and maintenance of a place of business for the rendering of repair service to any Ford automobiles in that place of business and the obvious grant of a right to the petitioner to hold himself out as a Ford dealer and display Ford signs, completely nullifies all of that argument of the petitioner.

That argument is based upon the erroneous premise that the sales agreement involves nothing but merely an agreement to buy and sell automobiles at an indefinite price to be later determined. The Circuit Court of Appeals, in finding that this is not a correct construction of the contract, said:

> "Vital and determinative are paragraphs 1 and 2. The first obligates defendant to sell, but upon 'terms, conditions and provisions hereinafter specifically set forth.' These conditions and terms are set forth in paragraph 2, which provides defendant 'will sell its products to plaintiff f. o. b. Detroit, Michigan at such net list price, or at such discounts from published list prices as are from time to time fixed by Company.' This seems, under the authorities and on reason, sufficiently definite.
>
> "The parties had been dealing with each other prior to the execution of the last contract. They knew of the practices of each other. The dealer

knew that automobiles were redesigned and new models appeared yearly and as a result prices changed at least seasonally. Defendant's business was nationwide and its agents were many. It was to this known situation that the contract referred. The parties negotiated with a background of past dealings and mutual knowledge of the practices of the trade. 'The net list prices and discounts from published list prices' appearing in paragraph 2 were well known to both parties. These net list prices and published list prices were the same to all dealers. They changed as necessity required. They were not lacking in definiteness, but provided a method whereby the prices could be definitely ascertained at any time'"[2] (R. 124-125, 113 Fed. 2d 620).

The Michigan Uniform Sales Act enacted in 1913 contains the following clause:

> "Definition and Ascertainment of Price * * *. The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealings between the parties." C. L. 1929 Sec. 9448.

The Wisconsin Act is identical and is found in Sec. 121.09 (1) Statutes of 1931. The sales agreement provided:

> "(2) Company will sell its products to Dealer f. o. b. Detroit, Michigan, at such net list price, or at such discounts from published list prices as are from time to time fixed by Company * * *" (R. 41).

It thus follows under both the Michigan statutes and the Wisconsin statutes that the sales agreement of May 26,

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"[2]

Ken-Rad Corp. vs. R. C. Bohannan, Inc., 6 Cir., 80 F. 2d 251;

Memphis Furniture Mfg. Co. vs. Wemyss Co., 6 Cir., 2 F. 2d 428;

Moore vs. Shell Oil Co., 139 Or. 72, 6 P. 2d 216;

Moon Motor Car Co. vs. Moon Motor Car, Inc., 2 Cir., 29 F. 2d 3."

1932 (R. 41-46) meets the requirements of the Uniform Sales Act. The argument of petitioner with reference to *Wardell vs. Williams,* 62 Mich. 50; and *Bastian vs. J. H. DuPrey Company,* 261 Mich. 94, is based upon a theory that the sales agreement involves absolutely nothing but a sale of automobiles at an indefinite price. This is not true and hence the argument is not in point. In the *DuPrey* case, upon which petitioner relies, the Supreme Court of Michigan holds that a contract to buy cucumbers to be grown and delivered during the 1931 season was not void for want of mutuality, and therefore that case is authority for the respondent's claim that the contract (R. 41-46) in question was good rather than petitioner's claim that it was void under the Michigan law. Also, the *Wardell* case is no authority on petitioner's point, as the contract was held void under the Statute of Frauds, and also because something was left to be negotiated before a contract was intended.

The other decisions cited in petitioner's brief not specifically referred to herein, do not relate to matters of local law or local decisions, and hence are not applicable under *Erie R. Company vs. Tompkins,* 304 U. S. 64, and the last rules of this court. Therefore the petitioner's reasons set forth under "C" in his petition, page 4, and under "3," pages 6 and 14 to 17 of his brief, have no application.

The cases cited by petitioner at the bottom of page 6 and at the top of page 7 of his brief, and claimed to be in support of his contention that the statute creates a cause of action for money damages, have no application because that is one of the questions that the Circuit Court of Appeals herein did not consider, as we have heretofore pointed out. Therefore, it is unnecessary to present an argument at this time on this question. However, we will briefly state why petitioner's claim is incorrect. The statute in question here relates merely to the granting of licenses and

provides under what circumstances licenses may be denied, suspended or revoked, which is an exclusive remedy granted the banking commission; (however, a remedy that cannot be applied against respondent for reasons presented herein, and other reasons that need not be discussed here because no question of revocation of licenses is involved). There is no legislative intent to create a cause of action for damages for any alleged violation. There is no criminal penalty provided for its violation. Petitioner has misconceived the principles of law applicable. The following cases clearly establish that this automobile licensing statute does not create a cause of action for damages.

*Progressive Miners of America Local Union No. 109 vs. Peabody Coal Co.,* 7 Fed. Supp. 340 (District Ct. E. D. Illinois, May 7, 1934) affirmed 75 Fed. (2d) 460, (C. C. A. 7th Circuit) February 6, 1935;

*Globe Newspaper Co. vs. George H. Walker,* 210 U. S. 356, 52 L. Ed. 1096, 38 Sup. Ct. R. 726, June 1, 1908;

*Decorative Stone Co. vs. Building Trades Council of Westchester County,* 23 Fed. (2d) 426 (C. C. A. 2nd Circuit) affirming decree, 18 Fed. (2d) 333, certiorari denied 48 S. Ct. 530, 277 U. S. 592, 72 L. Ed. 1005;

*Almy vs. Harris,* 5 Johns. (N. Y.) 175;

*Griswold vs. Camp.* 149 Wis. 399;

*State ex rel. Waldorf vs. Hill,* 217 Wis. 59.

**E — Should the Court be of the opinion that the Wisconsin Statute, if valid, governs this case, then a decision of the case would necessarily involve the questions raised on the record as to the validity of the Wisconsin Statute and as to the rights conferred by that statute.**

The District Court and the Circuit Court of Appeals found it unnecessary to decide these questions because those courts found that the statute was not intended to have retroactive effect on contracts made before it was enacted and the sales agreement in question was a valid contract between the parties terminated in accordance with its terms. This enabled those courts to enter a judgment in favor of the respondent without deciding the other questions involved in the case. But any decision in favor of the petitioner would necessarily have involved the determination of the other questions presented on the record as petitioner's claim seems to be based on the statute in question while respondent in its pleadings and before the District Court and the Circuit Court of Appeals has claimed both that the statute in question does not give rise to a civil cause of action by an automobile dealer like the petitioner under any circumstances and has also likewise asserted that the statute in question is a violation of the constitutions of the State of Wisconsin and of the United States (R. 22, 23, 25, 104, 122, 113, Fed. (2d) 619). Respondent asserted that such statute is unconstitutional on the ground it would impair the obligation of contracts, violate the due process clause and unconstitutionally delegate legislative power to the banking commission and also violate the commerce clause of the Federal Constitution, and would deny this respondent the equal protection of the laws. We are not presenting our argument on the question of the constitutionality of this statute in this brief because both courts below did not decide this question for the reason that they found it unnecessary to do so in the disposition that was

made of the case. The Circuit Court of Appeals in its opinion expressly stated:

> "Having reached the conclusion that the agreement was valid and binding and therefore subject to cancellation by either party upon the giving of written notice, the only remaining question is the effect of the Wisconsin statute upon such an existing contract."
>
> "We are convinced that the legislature did not intend to make its legislation, nor did the legislation, by its own terms, apply to and include existing contracts. *We must give to it a construction which will avoid a successful attack on its unconstitutionality*" (italics ours) (R. 125, 113 Fed. (2d) 621).

For the above reasons, the writ of certiorari prayed for should be denied.

Respectfully submitted,

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## Appendix.

Paragraphs 15, 16 and 17 of Subsection (3) (a) of Section 218.01 of the Wisconsin Statutes of 1937, were created by Chapter 378 of the Laws of 1937, effective July 14, 1937. Reference to the above Chapter 378 of the Laws of 1937 is omitted from the Appendix in petitioner's brief and should be added at the end of page 35 of petitioner's brief.